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No. 81-993

IN THE

Supreme Court of the United States

October Term, 1981

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION,
Appellant,

vs.

NINI MYRNA TAN, *et al.*,
Appellees.

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION,
Appellant,

vs.

WILLIAM ROMAGNOLI, *et al.*, (and Consolidated Cases),
Appellees.

On Appeal From the California Court of Appeal, Fourth Appellate District.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM OR DISMISS.

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APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM OR DISMISS.

I.
PRELIMINARY STATEMENT.

The judgment of the California Court of Appeal in the instant case rests squarely upon the determination of the federal preemption question set forth in appellant's Jurisdictional Statement. Appellees' Motion to Affirm or Dismiss argues incorrectly that an independent nonfederal basis for the judgment in the lower court exists, and further that the lower court correctly decided the preemption question. This motion must be denied for two reasons: first, the con-

clusion that an independent nonfederal basis exists is totally dependent upon an incorrect factual assumption, *i.e.*, that appellant intended to waive the protection of the due-on-sale clause; second, the argument concerning the preemption issue merely illustrates the substantiality of this issue and, therefore, should not be resolved until this Court has received full briefing and argument.

II.

THERE IS NO ADEQUATE NONFEDERAL BASIS SUPPORTING THE OPINION OF THE CALIFORNIA COURT OF APPEAL.

The argument in the Motion to Dismiss that there is an adequate, independent, nonfederal basis for the judgment in this case first assumes that the applicable federal regulation permits, rather than mandates, the use of due-on-sale clauses. Appellees then conclude that because a federal association can refrain from the use of a due-on-sale clause, the federal association can also use a modified or limited due-on-sale clause. Appellees then read together the due-on-sale clause in the instruments in the instant cases with Paragraph 15 of the applicable trust deed. Paragraph 15 provides either that the deed of trust shall be governed by the law of the jurisdiction in which the property is located, or that it shall be construed according to the laws of the State of California, depending upon which of the six consolidated cases is examined. Appellees then argue that since California law, by virtue of the *Wellenkamp** decision, has severely limited the use of due-on-sale clauses, the due-on-sale clause in the instant case was intended by the parties to have such a limited effect and, therefore, has no application to the cases now under consideration.

**Wellenkamp v. Bank of America*, 21 Cal. 3d 943, 148 Cal. Rptr. 379 (1978).

The fallacy in this analysis lies in the assumption that Paragraph 15 of the deed of trust has any impact whatsoever on the due-on-sale clause. Clearly, the intention of the parties was to adopt an *effective* due-on-sale clause — not one that was emasculated by the *Wellenkamp* decision. Moreover, the express language of the clause demonstrates an intent to accelerate the loan balance upon sale of the underlying security, and the practice of appellant over the years has always been to interpret and implement the due-on-sale clause according to its express terms. It is utterly specious for appellees to contend that a post-*Wellenkamp* California due-on-sale clause bears any substantive resemblance to the due-on-sale clause present in this case: a clause subject to *Wellenkamp* is so severely restricted as to provide virtually no substantial benefit to the lender, and certainly not the bargained for protection contained in the due-on-sale clause in this case.

This intent is also corroborated by the Federal Home Loan Bank Board's retrospective authorizing regulation (12 CFR §545.8-3(f, g)) and by its subsequent Statement of Policy. 46 Fed. Reg. 39123-24 (July 31, 1981). This interpretation, *i.e.*, that there was no intent on the part of the parties to waive the due-on-sale clause, was also expressed in an opinion letter to the Bank Board from the General Counsel for the Federal Home Loan Mortgage Corporation in 1978. (*See* letter of Henry L. Judy, dated May 24, 1978, in the Appendix hereto; this letter was attached to the *amicus curiae* brief filed by the Federal Home Loan Mortgage Corporation in the California Court of Appeal in *Panko v. Pan American Federal Savings and Loan Ass'n*, 119 Cal. App. 3d 916, 174 Cal. Rptr. 240 (1981), which is Case No. 81-922 in this Court).

Furthermore, any contrary interpretation of the parties' intent is illogical. Such an interpretation is inconsistent with

the explicit wording of the due-on-sale clause and with the law existing when this clause was drafted, *i.e.*, prior to the *Wellenkamp* decision. Appellees' interpretation also twists the obvious meaning of the so-called choice of law clause, which was clearly intended to adopt principles of California law that were not preempted by federal law and were necessary for the operation of the contract.

Finally, appellees' contention that appellant waived the protection of the due-on-sale clause is to be determined by federal — not state — law. (*See* Brief Opposing Motion to Affirm or Dismiss, in *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, Case No. 81-750, at 7-8). Thus, the issue should be resolved after full briefing and argument, and not on a motion to dismiss.

III.

WHETHER OR NOT PREEMPTION EXISTS IN THIS CASE IS A SUBSTANTIAL FEDERAL ISSUE, AND SHOULD NOT BE RESOLVED ON A MOTION TO AFFIRM.

The Motion to Affirm in this case presents, in essence, a substantive argument on the merits of the federal preemption issue. Although that argument reaches an incorrect conclusion, it does demonstrate the substantiality of the federal question in this case and the need for full briefing and oral argument.

A. Federal Law Preempts the Application of Wellenkamp to Federal Savings and Loan Associations.

There is no necessity that state law be inconsistent with an *express* mandate of congress in order for state law to be preempted. Preemption may be implied from the nature of the federal legislation and the subject matter in question:

> "It long has been the rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of

such result is wanting." *Bethlehem Steel Co. v. New York St. Lab. Rel. Bd.*, 330 U.S. 767, 772 (1947).

Indeed, preemption may take place simply by vesting in a federal administrative agency comprehensive authority to prescribe regulations governing the preempted field, and such preemption will render inapplicable any state laws dealing with a phase of the subject that is not treated by the administrative regulations:

> "When Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any state action if it is clear that Congress has intended no regulation except its own. . . .
>
> ". . . But when federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the federal agency." 330 U.S. at 773-74; *accord, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 139-40 (1973); *Pennsylvania v. Nelson*, 350 U.S. 497, 502-04 (1956); *Rice v. Santa Fe Elev. Corp.*, 331 U.S. 218, 230 (1947); *Northern States Power Co. v. Minnesota*, 447 F. 2d 1143, 1146, 1152 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972); *HMW Indus., Inc. v. Wheatley*, 368 F. Supp. 915, 917 (D. St. Croix 1973); *aff'd*, 504 F.2d 146 (3d Cir. 1974); *see also Conference of Fed. Sav. & Loan Ass'ns v. Stein*, 604 F. 2d 1256, 1260 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1980).

The contention advanced herein by appellees, namely, that the Bank Board acted in an unauthorized, self-aggrandizing fashion when it issued it regulation recognizing the

use of due-on-sale clauses, has been repeatedly rejected by federal and state courts. (*See* Jurisdictional Statement, footnote on pages 13-14). It is clear that the Bank Board was given by Congress virtually plenary regulatory authority over both the creation and the operation of federal associations. 12 U.S.C. §1464(a)*

Thus, the only reasonable construction to be placed upon this legislation is that the responsible federal regulatory agency, the Bank Board, had *full* authority to control all aspects of the operation of federal savings and loan associations. This conclusion has been reached by numerous courts, for example:

> "The Home Owners' Loan Act of 1933, 12 U.S.C. §§1461 *et seq.* (HOLA), was the result of congressional dissatisfaction with state law and practice in the financing of home construction. The first federal effort was through the Home Loan Bank Act of 1932. This failed to attack the problem satisfactorily.
>
> "The result was HOLA, a radical and comprehensive response to the inadequacies of the existing state systems. A *federal* savings and loan system was created. The Federal Home Loan Bank Board (the Bank Board) was created with extremely broad powers to promulgate such rules and regulations. . . .

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*"In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations it may prescribe, to provide for the organization, incorporation, examination, operation and regulation of associations to be known as 'Federal Savings and Loan Associations.' . . . giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States."

The legislative intent underlying this legislation was expressed in a letter, dated April 13, 1933, by President Franklin D. Roosevelt:

> "Implicit in the legislation . . . is the declaration of national policy. This policy is that the broad interests of the Nation require that special safeguards should be thrown around home ownership as a guarantee of social and economic stability." H.R. Doc. No. 19, 73rd Cong., 1st Sess. 168, 1702 (1933).

. . .

"Pursuant to its authority, the Bank Board has promulgated regulations comprehensively dealing with the creation and operation of federal savings and loan associations. . . .

. . .

"In our judgment the regulatory control of the Bank Board over federal savings and loan associations is so pervasive as to leave no room for state regulatory control. . . .

"The broad regulatory authority over the federal associations conferred upon the Bank Board by HOLA does wholly preempt the field of regulatory control over these associations." *Conference of Fed. Sav. & Loan Ass'ns v. Stein*, 604 F. 2d 1256, 1257-58, 1260 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1980).

The opinion in *Conference* follows the earlier district court holding in *People v. Coast Fed. Sav. & Loan Ass'n*, 98 F. Supp. 311 (S.D. Cal. 1951). In that case the district court held that the California Superintendent of Banks had no authority to impose state statutory penalties against a federal association that was alleged to have held itself out as a bank and led the public to believe that it was a bank, without authority and in violation of state statutes. The district court dismissed the action, holding:

"Not only does the act of Congress [HOLA] which authorized the creation, operation, and supervision of federal savings and loan associations by the Home Loan Bank Board, embrace the entire field, but the comprehensive rules and regulations adopted by the Board clearly meet the test of covering the subject matter of the [state] statute. . . . It seems clear that Congress has preempted the field, making invalid the state statutes plaintiffs rely upon when attempted to be invoked against a Federal savings and loan association.

. . .

"The congressional mandate for uniformity would be destroyed if these associations were subject to federal control, plus concurrent state control, which latter control might vary in every one of the forty-eight states.

. . .

"Since the statutes upon which the complaint is based are invalid as applied to this defendant, a federal instrumentality, the complaint fails to state a claim upon which relief can be granted. . . ." 98 F. Supp. at 318-20 (citations omitted).

Appellees also claim that the state regulation in the instant case emanated in a field that is of uniquely local concern and regulation and, therefore, state regulation should not normally be subject to preemption. (Motion to Affirm or Dismiss, at page 7). It should be noted, however, that in *Meyers v. Beverly Hills Fed. Sav. & Loan Ass'n*, 499 F. 2d 1145 (9th Cir. 1974) this same question was raised, addressed, and resolved in favor of the proponents of federal regulation. In that case the plaintiffs challenged the authority of federal associations to assess prepayment charges in the event the principal of a loan was repaid prior to maturity. The district court dismissed, and the Ninth Circuit subsequently affirmed, on the ground that federal law had preempted the field, rendering state law inapplicable to the mortgage loan contracts of such associations. Thus, the court rejected the claim that the imposition of such charges was regulated by California mortgage and real property laws.

This holding was not as unusual as appellees now imply, for similar holdings have been reached in other areas of the law. For example, in *Bryan v. Itasca County*, 426 U.S. 373

(1976) this Court held that state collection of real property taxes on Indian trust land was preempted by federal law.*

Similarly, in the instant case there is no reason why federal regulation of due-on-sale clauses should be subject to state preemption simply because the loans in question are secured by California real property.

In any event the issue herein raised by appellees goes to the merits of this appeal and does not indicate a defect in jurisdiction. On the contrary, it indicates the significance and substantiality of the legal issues presented by this appeal and demonstrates the need for a full briefing and oral argument in this case.

IV.
CONCLUSION.

For the reasons stated herein, the Motion to Affirm or Dismiss should be denied.

DATED: January 7, 1982.

Respectfully submitted,

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and
WILLIAM W. BERRYHILL,
By PETER D. COLLISSON,
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**See Heckman v. United States*, 224 U.S. 413 (1912) (right of alienation of Indian land is subject to cancellation pursuant to federal law); *Palm Springs Paint Co. v. Arenas*, 242 Cal. App. 2d 682, 51 Cal. Rptr. 747 (1966); Federal Tax Lien Act of 1966, 26 U.S.C. §7426 (state foreclosure actions do not affect federal tax liens on foreclosed property unless additional procedures are followed); *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917) (federal maritime law preempts state workers compensation law), *modified in Romero v. International Term. Oper. Co.*, 358 U.S. 354 (1959) *and superceded by statute as stated in Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980); Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. Rev. 535 (1975).